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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,

Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of this Court in *Hagen v. Utah*, 510 U.S. 399 (1994) has been misconstrued to preserve historic reservation boundaries in Utah that encompass hundreds of thousands of acres of *fee* lands, contrary to:

(i) Twenty years of express representations by the parties and *amici* in the *Ute Indian Tribe* and *Hagen* litigation, which conceded that the reservation would consist of only *trust* lands if the public domain language of the acts was implemented (as this Court held in *Hagen*), and

(ii) Thirty-five years of express representations by the parties and *amici* in all other related litigation, which similarly conceded that other affected reservation areas would also consist of only *trust* lands if the reservation areas were, in fact, diminished, as this Court recognized in *Hagen*. *Seymour, Mattz, DeCoteau, Rosebud, Solem,* and *Hagen,* and

(iii) Any practical consideration when Respondent Tribe has conceded that implementation will be completely unworkable and unprecedented ("jurisdictional chaos"), and

(iv) Any consideration of comity because an injunction will be said to preclude the Supreme Court of the State of Utah (and the parties and all others) from expressing their views on *Hagen,* in spite of the fact that the Utah Supreme Court was *affirmed* in *Hagen*.

2. Whether the precedential scope of the decision of this Court in *Hagen v. Utah*, 510 U.S. 399 (1994), has been improperly restricted on "finality" principles by the court of appeals, which summarily precluded any further consideration, in light of *Hagen,* of the status of the original Uncompahgre reservation and the national forest, which were issues *in pari materia* in the *Ute Indian Tribe* litigation:

(i) When the district court expressly stated that it did "not reach any question" regarding the status of these areas, "[t]hese questions await another day," and

(ii) When the United States specifically conceded that, in its view, the historic Uncompahgre reservation no longer exists (and it is no longer inhabited by any tribal member), and when an injunction precludes comity considerations.

LIST OF PARTIES

Petitioners are Duchesne County, Utah and Uintah County, Utah, political subdivisions of the State of Utah. They were defendants in the original action.

Respondent Ute Indian Tribe of the Uintah and Ouray Reservation, is a federally recognized tribe of Indians. It was the plaintiff in the original action.

The State of Utah appeared as a defendant in the original action and Roosevelt City, Utah, and the City of Duchesne, Utah, municipal corporations, appeared as defendants in the original action.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Duchesne County, Utah, and Uintah County, Utah, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding on May 8, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 114 F.3d 1513 (10th Cir. 1997) and is reprinted at 1a-36a. The opinion of the federal district court for the district of Utah is reported at 935 F.Supp. 1473 (D.Utah 1996) and is reprinted at 37a-157a. A copy of the denial of Petition for Rehearing and Suggestion for Rehearing *En Banc* of Defendants/Appellants Duchesne County, Utah, and Uintah County, Utah, issued July 1, 1997, appears at 158a-159a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on May 8, 1997. The Counties' Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on July 1, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Act of May 27, 1902, ch. 888, 32 Stat. 245; Act of March 3, 1905, ch. 1479, 33 Stat. 1048. Copies of these Acts appear at 160a-161a and 161a-164a respectively.

STATEMENT OF THE CASE

Introduction. The issue in this litigation centers around efforts to implement the mandate of the 1994 decision of this Court in *Hagen v. Utah,* 510 U.S. 399 (1994) in the State of Utah. To date, these efforts have been successful only in part and even that success was not effective until just days ago, an incredible three years and seven months after *Hagen* was decided. *Ute Indian Tribe v.*

Utah, No. 75-CV-408-J (D. Utah Sept. 15, 1997) (Order vacating injunction as to Roosevelt City, Utah).

In all other respects, the balance of the *Hagen* decision has been seriously misconstrued, impermissibly narrowed and effectively *still* held in abeyance. As a result, not only has a mandate of this Court been frustrated, but the misconstruction of *Hagen* promises consequences that even Respondent Tribe describes as nightmarish, and not just in the State of Utah, but throughout former reservation areas across the United States. *See* Br. for the Pet'r. at 2 n.2, Br. of Charles Mix County, S.D. in Supp. of Pet'r. at 30 n.11, Br. of Duchesne County, Utah and Uintah County, Utah in Supp. of Pet'r. at 1-2, *Yankton Sioux Tribe*, (No. 96-1581). *Hagen* was not intended to cause this result.

Over four years ago, this Court granted certiorari in *Hagen* to resolve a direct conflict between decisions of the Tenth Circuit Court of Appeals and the Supreme Court of Utah. Previously, in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985), (en banc) *cert. denied*, 479 U.S. 994 (1986), the Tenth Circuit concluded, in a divided *en banc* opinion, that the original boundaries of the Uintah reservation had *not* been diminished. In *State v. Hagen*, 858 P.2d 925 (Utah 1992) and *State v. Perank*, 858 P.2d 927 (Utah 1992), however, the Supreme Court of the State of Utah reached the *opposite* conclusion.

In *Hagen*, this Court considered those competing arguments and concluded that the Uintah reservation had in fact been *diminished*, in accordance with the views of the Supreme Court of the State of Utah. *Hagen*, 510 U.S. at 421-422.[1]

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[1] Other panels of the Tenth Circuit subsequently recognized, in passing, the extent to which *Hagen* completely undermined the holding and rationale of *Ute Indian Tribe*. *United States v. Cuch*, 79 F.3d 987, 989 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 384 (1996) ("effectively overruled") and *Gardner v. United States* at 5 n.4, No. 93-4102 (10th Cir. May 5, 1994) (unpublished order and judgment) ("issue was recently resolved"). *See also United States*

1. Federal District Court. From the beginning, in the State of Utah, however, the issue was presented to the federal district court in a most unusual manner. Immediately after the slip opinions were first released by the Supreme Court of the State of Utah in *Perank* and *Hagen*, the Ute Tribe "reopened" the earlier *Ute Indian Tribe* case by filing a motion in the federal district court in Utah, in this case, for injunctive relief against the State and local governments. This motion was filed pursuant to a claimed exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *Ute Indian Tribe v. Utah*, 935 F.Supp. 1473, 1482 (D.Utah 1996), App. 44a. The motion sought to permanently enjoin the Utah Supreme Court from entering as final its decision in those cases, and to enjoin the State and its political subdivisions from enforcing or relying upon those decisions in any way. *Id.* The Tribe simultaneously sought a temporary restraining order or preliminary injunction having the same effect. *Id.* at 1482, App. 44a. The United States, as *amicus curiae*, unequivocally supported the Tribe's position.[2] The entire matter in the federal district court was assigned to the Honorable Chief Judge Bruce S. Jenkins, whose earlier views on the same

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v. Duncan, 857 F.Supp. 852 (D.Utah 1994). (And even before *Hagen*, the panel in *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) noted some fundamental problems with *Ute Indian Tribe*, as this Court subsequently recognized). *Hagen*, 510 U.S. at 414.

[2] Although the United States told this Court in 1986 in *Ute Indian Tribe* that there would be time enough another day for the Utah Supreme Court to express its views, when they were suggesting, in support of the Ute Tribe, that certiorari be denied, the United States now told the federal district court another story. Br. for the United States as *Amicus Curiae* at 15, *Ute Indian Tribe*, 479 U.S. 994 (1986) (No. 85-1821). *See also State v. Perank*, 858 P.2d 927, 931 (Utah 1992). In this new Department of Justice brief, the State of Utah's activity was described as "intolerable and dangerous" and the United States said it "must be enjoined." United States' Mem. as *Amicus Curiae* in Supp. of Ute Indian Tribe's Mot. for Injunctive Relief at 6, *Ute Indian Tribe v. Utah*, (D.Utah, Nov. 23, 1992) (No. C-75-408-J).

subject in *Ute Indian Tribe* had just been rejected by the Utah Supreme Court. *See generally Perank*, 858 P.2d at 927.

In August, 1992, the State and local defendants and the Ute Tribe, through counsel, entered into a stipulation for the entry of injunctive relief pending the decision of the district court on the Ute Tribe's motion for permanent injunctive relief. The stipulation by its terms was to expire on the day after the district court issued its decision on the Tribe's motion for injunctive relief. *Ute Indian Tribe*, 935 F.Supp. at 1482, App. 44a. The district court issued an Order ("Injunctive Order") incorporating the parties' stipulation concerning injunctive relief on September 2, 1992, *nunc pro tunc* to August 3, 1992. *Id.* at 1482, App. 44a.

In the ensuing months, the district court vacated several previously scheduled hearings on the Tribe's motion for injunctive relief pending this Court's consideration of the certiorari petition in *Hagen*, and subsequently pending this Court's decision on the merits. *Id.* at 1482-1483, App. 45a. (The injunction and the proceedings in the district court were specifically brought to the attention of this Court in *Hagen*.)

On February 23, 1994, this Court decided *Hagen*, affirming the decisions of the Utah Supreme Court and ruling that the Uintah reservation had been diminished for jurisdictional purposes. A petition for rehearing was denied by this Court on April 18, 1994. *Hagen v. Utah*, 511 U.S. 1047 (1994).

The next week, on April 25, 1994, the State and local defendants promptly filed a motion in the federal district court to vacate and set aside the Injunction Order, and to dismiss the Ute Tribe's motion for permanent injunctive relief. *Ute Indian Tribe*, 935 F.Supp. at 1483, App. 46a. After a United States Magistrate dismissed a federal prosecution of an Indian for crimes occurring in Roosevelt, Utah, on the basis that *Hagen* had held that such

prosecutions were a state responsibility, the State and its subdivisions also moved the federal district court for an Order at least modifying the Injunction Order to permit immediate state prosecution within the former reservation boundaries.

In May, 1994, the district court temporarily modified the Injunction Order to permit the State and local defendants to prosecute *felony* crimes occurring on lands within the original boundaries of the Uintah Reservation which were not "Indian country" as defined by 18 U.S.C. § 1151 *et seq.* *Id.* at 1483, App. 46a. The district court's modification was without prejudice to the collateral estoppel claims of the Tribe, and did not determine the Indian country status of particular lands. *Id.*

In September, 1994, prior to hearing oral arguments on the pending motions, the district court entered its Pre-Trial Order, based upon a stipulation between the Ute Tribe and the State and local defendants. *Id.* at 1484, App. 48a. The Pre-Trial Order provided, *inter alia,* that lands that had been opened and settled pursuant to federal homestead laws were not Indian country pursuant to 18 U.S.C. § 1151, as *Hagen* held. The district court's stipulated finding that homesteaded lands were not Indian country was subject to the Ute Tribe's contention that the State and local defendants were collaterally estopped by *Ute Indian Tribe* from reliance on *Hagen.* *Id.* at 1484, App. 49a. With the case in this posture, the injunction was still in effect in spite of *Hagen,* with the limited exception noted above.

Finally, after twenty-five months, in April, 1996, the district court issued a ninety-six page Memorandum Decision in connection with the pending motions. *Id.* at 1473, App. 37a-157a. Even after two years, the district court *declined to rule* on the merits of the Tribe's motion for injunctive relief and the State's motion to dissolve the Injunction Order. The district court instead *continued* the Injunction Order in full force and effect, even while recognizing that "Indian country" did not include "unallotted

and unreserved lands of the Uintah Reservation that were opened to entry in 1905, to the extent that those lands were not later restored to tribal ownership." *Id.* at 1531, App. 152a. This Memorandum Decision had the effect of continuing to permit certain State felony prosecutions of Indians, but it *continued* the injunction in effect as to all misdemeanor prosecutions of Indians and exercises of civil jurisdiction within the historic reservation boundaries, even in areas the district court held to be outside Indian country.

Further, adopting verbatim a new post-*Hagen* argument submitted by the Ute Tribe with the support of the United States, *amicus curiae*, the district court also held that historic reservation boundaries persist despite *Hagen* and encompass *all* fee lands in the area except for homestead lands. For nearly two decades, the Ute Tribe and the United States had told everyone, including the federal district court (and this Court), exactly the opposite story —*that unless they were successful in the diminishment/disestablishment litigation, the reservation would consist of only trust lands* (still a million plus acre reservation). The State and local governments proceeded on the basis of the same assumption because that was the only assumption supported by three and one-half decades of precedent from this Court and all lower courts.

For this reason, the new post-*Hagen* argument adopted by the district court is unprecedented in this type of litigation and unprecedented in procedural and practical complexity. First it is unprecented in this type of litigation because no other fee lands in similar diminished/disestablished areas in the United States are within the limits of Indian reservations. *Seymour v. Superintendent,* 368 U.S. 351 (1962); *Mattz v. Arnett,* 412 U.S. 481 (1973); *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *Solem v. Bartlett,* 465 U.S. 463 (1984) and *Hagen v. Utah,* 510 U.S. 399 (1994) were all argued and described on the basis of this understanding, and correctly so. Secondly, it is unprecedented in procedural and practical com-

plexity in that a parcel by parcel *title* search will now be required, in every instance, to determine jurisdiction under this new post-*Hagen* argument. In the past, simple *tract* identification sufficed.

Lastly, the district court also expressly held that it "need not" and did "not reach any question" regarding the present status of the Uncompaghre reservation or the lands withdrawn for national forest purposes. According to the district court, "[t]hose questions await another day." *Ute Indian Tribe,* 935 F.Supp. at 1528, App. 146a. Of course, in the interim, the re-established reservation status of these areas as set forth in the 1985 *Ute Indian Tribe* decision would continue.

In connection with the Memorandum Decision, the district court also filed a Certificate and Request for Further Instructions ("Request") directed to the United States Court of Appeals for the Tenth Circuit. *Id.* at 1531, App. 154a. In the Request, the district court noted the direct conflict between the court of appeals' mandate in *Ute Indian Tribe,* which held that all lands within the historic reservation boundaries were Indian country, and the decision of this Court in *Hagen,* which held that those boundaries had been diminished for jurisdictional purposes. *Id.* The district court requested further instructions in light of this conflict, and indicated that the court of appeals could "construe this court's request for instructions as an invitation to recall its own mandate for further consideration." *Id.* at 1533, App. 157a.

On April 12, 1996, the State and local defendants filed their Notice of Appeal from Judge Jenkins' decision continuing the Injunction Order in effect, pursuant to 28 U.S.C. § 1292(a)(1). *Id.* at 1531, App. 153a.

2. Court of Appeals. With the mandate in *Hagen* restricted in this fashion by the injunction, which continued in force and effect as noted above, the court of appeals, on its own motion, expedited the appeal by Order dated April 30, 1996. *Ute Indian Tribe v. Utah,* 114 F.3d 1513 (10th Cir. 1997), App. 1a. Briefing was completed in

short order and oral argument submitted on September 10, 1996.[3] Eight months later, the panel affirmed the district court in all substantial respects.

Although the panel did reject the Ute Tribe's collateral estoppel argument limiting *Hagen's* viability, the *Ute Indian Tribe* mandate was modified only to exclude homesteaded land. In essence, the court of appeals also adopted the new post-*Hagen* argument of the Ute Tribe and the United States. *Not a single case was cited as precedent for this position.*

For some reason, the panel also summarily decided to further restrict the precedential scope of *Hagen* with respect to the Uncompaghre reservation and the national forest lands. *Id.* at 1530-1531, App. 35a-36a. Without even mentioning that the district court expressly held that it "need not" and did "not reach any question" regarding the status of these areas ("those questions await another day"), the panel ruled that principles of "finality" required continued recognition of the reservation status acknowledged in the first instance in 1985 in *Ute Indian Tribe*. In the process, the panel said nothing about the significant concession by the United States (made after *Ute Indian Tribe* and presently reiterated before the court of appeals) that the Uncompahgre reservation *no longer existed* in its view for a number of important reasons.[4] In the final analysis, the court of appeals acknowledged that even a "misreading of the applicable legislation" would not "justify departing from our earlier judgment." *Id.* at 1529, App. 31a.

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[3] The panel consisted of Circuit Judge, Deanell R. Tacha and Senior Circuit Judge, William J. Holloway, Jr. of the Tenth Circuit and Senior Circuit Judge, John C. Godbold of the Eleventh Circuit sitting by designation.

[4] These reasons, which have previously been brought to the attention of this Court on more than one occasion, also include the general observation that not a single tribal member resides anywhere within the original million plus acre "reservation" area.

A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by Duchesne County, Utah and Uintah County, Utah on June 11, 1997. That petition was denied on July 1, 1997.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE DECISION OF THIS COURT IN *HAGEN* HAS BEEN MISCONSTRUED TO PRESERVE HISTORIC RESERVATION BOUNDARIES CONTRARY TO SUBMISSIONS IN *HAGEN* AND CONTRARY TO RELATED PRECEDENT OF THIS COURT.

A. The Post-*Hagen* Argument Removes From Indian Country Status Only Those Lands Ceded, Restored to the Public Domain, or Otherwise Directly Affected, Leaving Historic Reservation Boundaries Intact.

The Counties want to primarily direct the Court's attention to the new argument submitted below by the Ute Tribe and the United States that is premised on an overly restrictive view of the decision of this Court in *Hagen*. According to this new post-*Hagen* argument, even if an act was intended to diminish or disestablish a reservation or a portion thereof, it would remove from Indian country status *only* those lands ceded, restored to the public domain, or otherwise directly affected, leaving historic reservation boundaries *intact* so as to encompass all other *fee* lands in the same area.

This new post-*Hagen* argument of the Ute Tribe and the United States is based only on isolated sentences in the *Hagen* opinion, taken out of context and used in conjunction with "diminished" terminology to support a reservation concept that would have been unthinkable a century ago. This argument is pure sophistry, and it flies in the face of the submissions and decisions in *Seymour, Mattz, DeCoteau, Rosebud, Solem* and *Hagen*. In each and every one of these cases it was conceded that affected

reservation areas would consist of only trust lands if the reservation areas were, in fact, diminished.[5]

In addition, the Ute Tribe and the United States concede that after the post-*Hagen* argument is recognized, implementation will require *title* searches, instead of the routine fee/trust checkerboard identifications that have been in place for decades in these areas similarly situated. In a Petition for Rehearing in this Court in *Hagen*, the Ute Indian Tribe acknowledged that this scenario promised nightmarish consequences and would be completely unworkable. Br. of Ute Indian Tribe in Supp. of the Pet. for Reh'g at 1, *Hagen* (92-6281). *Hagen* does not support this argument. No decision of this Court supports this argument.

The Counties are in a favorable position to offer views in response to this novel argument of the Ute Tribe and the United States. As *amici curiae* participants in *Hagen* and *Hagen*-related litigation for almost two decades, the Counties are as familiar as the Ute Tribe and the United States with the submissions and the record in *Hagen* and similar cases. As this Court has noted, the argument is of more than just passing concern to the residents in these Counties. *Hagen*, 510 U.S. at 421.

B. Respondent Ute Tribe Has Conceded That Implementation of the Holding of the Tenth Circuit Will Be Completely Unworkable and Unprecedented.

Subsequent to the decision of *Hagen*, the Ute Tribe attempted to submit an *amicus curiae* brief in support of the petition for rehearing in this Court. The Court did not allow the *amicus* brief to be filed. Counsel for Petitioner in *Hagen* thereafter promptly resubmitted the same text under the caption of a Motion to Supplement Petition

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[5] The same argument ignores the fact that when trust title to an allotment is extinguished and passes into fee status, it would otherwise cease to be Indian country. 18 U.S.C. § 1151(c). *DeCoteau*, 420 U.S. at 427 n.2, 446-447. It also ignores special Utah acts and other federal Utah orders directed to fee lands, inconsistent with continuing reservation status.

for Rehearing. It was in this form that the new post-*Hagen* theory of what was really at issue in *Hagen* first surfaced. This Court denied the petition without comment.

The first problem with the new post-*Hagen* theory was that it squarely conflicted with the previous "disestablished" except for "trust" land arguments submitted by the parties. As a result, the Tribe simply did not mention this point. Secondly, apart from the apparent *dilemma* of attempting to present argument that counters traditional disestablishment/diminishment considerations and addresses disestablishment/diminishment precedent and issues in those terms (as the Ute Tribe did and continues to do to this day), while at the same time maintaining that disestablishment/diminishment in the sense of those cases was *never* really an issue, the substance of the motion is noteworthy in only one other respect.

In the process of telling this Court that its decision in *Hagen* only excised the unallotted homestead land from the Uintah reservation, leaving the historic reservation boundary otherwise intact (according to the new post-*Hagen* theory), the Ute Tribe submission makes one *critical* concession. This concession, in the Counties' view, is telling here insofar as practical considerations have any role in this process.

According to the Ute Tribe admission, if this *new post-Hagen theory* were really the holding of *Hagen,* "consistent law enforcement" and the "administration of civil laws" would be "*virtually impossible*" throughout the entire area. Br. of Ute Indian Tribe in Supp. of the Pet. for Reh'g at 4, *Hagen,* (92-6281). We agree. Similarly, according to the Ute Tribe submission, it would also be "virtually impossible to bring any continuity or organization to such regulatory activities as zoning, liquor regulation and taxation." *Id.* We also agree. In addition, the Ute Tribe submission goes on to assert that:

> The *jurisdictional chaos* is further increased because, within the townsites established under the 1905 Presidential Proclamation, the lots that had not been pur-

> chased were restored to the Tribe by the 1945 Restoration Order. Thus, the State may have jurisdiction over one lot, but the Tribe and United States may have jurisdiction over the lot next door. Conceivably, a store within a townsite or Roosevelt City could be located on two lots—one a former homestead and one a former allotment or parcel restored to the Tribe. Under such circumstances, the majority's decision [*Hagen*] [new post-*Hagen* theory] could result in the *absurd situation* of a tribal member being subject to or exempt from paying State sales taxes depending on the location within the store of the item purchased.

Id. at 4-5 (emphasis added) (footnote omitted).

Importantly, the Counties further agree with the hypothetical conclusion in this argument. As the Ute Tribe stated:

> If all of the non-trust lands had been disestablished from the Reservation, as Utah implied, jurisdictional determinations would require a tract book search to discover the *trust/non-trust* status of the land [*DeCoteau* and *Rosebud*]. However, given the various categories of land existing on the Reservation, under the majority's decision [*Hagen*] [new post-*Hagen* theory] jurisdictional determinations will require a tract-by-tract *title search* in order to ascertain whether a particular site is homestead land, former allotment land now in fee status, land restored to tribal ownership under the 1945 Restoration Order, land partitioned under the Ute Partition Act, present allotted land or tribal trust land.

Id. at 3-4 (first emphasis added).

In this instance, the Ute Tribe submission is absolutely correct. To the extent that *Hagen* represents disestablishment/diminishment in the traditional sense, only trust lands are Indian country under 18 U.S.C. § 1151(c). In this situation, trust tract searches are occasionally necessary. Of course, this result was approved in *DeCoteau* and *Rosebud* for the reasons there stated. *DeCoteau*, 420 U.S. at 427 n.2, 429 n.3, 446-447. *Rosebud*, 430 U.S.

at 584. *See also Yazzie*, 909 F.2d at 1421-22. And in the decades since the decision of this Court in *United States v. Pelican*, 232 U.S. 442 (1914), no significant problems have arisen anywhere.

However, to the extent that anyone accepts the new post-*Hagen* theory adopted by the court of appeals, a complete title search would be necessary for each and every arrest on fee lands throughout entire areas to determine if the ultimate source of title was actually homesteaded land. Because the vast majority of all crimes are committed on these fee lands (population centers, highways, and so forth) "jurisdictional chaos" would truly result. And the administration of civil laws would truly be "virtually impossible," as the Ute Tribe stated.

Notwithstanding the views of the federal district court, it is difficult to believe that any panel of any circuit familiar with the actual administration of "Indian country" issues would accept this post-*Hagen* argument (even without the admissions of the Ute Tribe). That the Tenth Circuit would do so, in light of these admissions, and say that *Hagen* required this result is truly perplexing. And the explanation by the panel clarifies nothing with respect to the "jurisdictional chaos" acknowledged by the Ute Tribe:

> We note that this conclusion has the benefit of producing a stable, unchanging allocation of jurisdiction. Under our approach, the Tribe and the federal government retain jurisdiction over all trust lands . . . *and* the three categories of *non-trust lands* [fee lands] that remain within the boundaries of the Uintah Valley Reservation. The state and local defendants have jurisdiction over the fee lands removed from the Reservation under the 1902-1905 allotment legislation. Although a *title* search may be necessary to determine which lands were opened under the 1902-1905 legislation, the parties' respective jurisdictions will never change once the status of those lands is conclusively determined. By contrast, under the defendants' theory (i.e. that Indian country is limited to trust lands) the Indian country status of land would change as trust lands are transferred into fee

> lands. We recognize that while our approach might result in a checkerboard allocation of jurisdiction, such a result is more desirable than the defendants' approach, which would produce a "moving checkerboard" because lands leaving trust status would also lose their status as Indian country.

Ute Indian Tribe, 114 F.3d at 1530 (emphasis added), App. 35a.

"That Indian country is limited to trust lands" is something more than just "defendants' theory." The acts of Congress that have defined "Indian country" and the decisions of this Court that have interpreted those acts should have played some role in the process. Under this "approach" they did not. The panel should have squarely rejected the new post-*Hagen* argument.[6]

C. The Misreading of the *Hagen* Opinion Has Far-Reaching Consequences.

The legal issues are relatively straightforward with respect to the post-*Hagen* argument. Nevertheless, for over 25 months, the district court in Utah, at the urging of the Ute Tribe and the United States, resisted the mandate of this Court, and then issued a ninety-six page Memorandum Opinion that wholly obscures an otherwise fairly simple question. *Ute Indian Tribe*, 935 F.Supp. 1473, App. 37a-

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[6] To the extent that the panel's latest decision summarily precludes any reconsideration regarding the status of the Uintah National Forest or the original Uncompahgre reservation (as mistakenly set forth in *Ute Indian Tribe*, 773 F.2d at 1089-1093) because of "finality" principles, it is in further conflict, in principle, with *Hagen*. Considering the very significant observation of this Court in *Hagen* that the Tenth Circuit's en banc opinion altered *decades* of "justifiable expectations," *Hagen*, 510 U.S. at 421, the balance of the panel's latest opinion regarding "finality" does not really ring true. In addition, the views of the panel in this respect do not reflect any consideration of contrary views noted in decades of previous federal and state opinions noted by this Court in *Hagen*. Because the district court refused to address the national forest and the original Uncompahgre issues, *Ute Indian Tribe*, 935 F.Supp. at 1530, App. 150a, the panel should not have rushed to judgment on this question and it should not have precluded the Utah Supreme Court from expressing its views.

157a. In *Hagen*, this Court squarely rejected the previous views of the Ute Tribe and the United States and the same district court specifically with respect to the status of the original Uintah reservation. Now, the Ute Tribe and the United States and the same district court have somehow convinced a panel of the Tenth Circuit that, in the process, this Court granted certiorari only to fashion a very limited opinion in *Hagen*, but that *Hagen* also created a jurisdictional nightmare in practical terms. This is clearly not the case.

According to this novel argument, this Court intended *Hagen* to *undermine* the most basic premise of all previous disestablishment/diminishment decisions: namely, that surplus land statutes either disestablished original reservation boundaries and left remaining trust land as Indian country/reservation, or they did not.

Yet, it was because of a recognition of this fundamental premise that the Ute Tribe told this Court in *Hagen*:

> [T]he Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, *finding* that the Reservation consists only of those lands held in *trust* by the United States for the Tribe or individual Indians . . . . if this Court were to alter the boundaries of the Reservation. Such a judgment would *reduce* the Reservation by almost *three million* acres and *deprive* the Tribe and the United States of all civil and criminal jurisdiction over the *non-trust lands* of the Uintah Valley portion of the Reservation.

Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 4-5, 7, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added) (footnote omitted).

The United States told this Court essentially the same thing.

Later, the Ute Tribe and the United States adopted the novel position noted *supra*, which instead assumes that in addition to the trust land, a substantial amount of non-Indian fee land is still within original reservation boundaries which this Court in *Hagen* intended to leave intact.

The post-*Hagen* argument is completely untenable. It is contrary to what the Ute Tribe and the United States repeatedly told this Court. *And not a single case can be cited in support of this proposition.*

To argue that this Court would adopt such a radical departure in its disestablishment/diminishment precedent, without even mentioning that fact in the text of the *Hagen* opinion, is pure sophistry. This analysis also expressly conflicts with other precedent the Court repeatedly cited throughout the *Hagen* opinion. Apparently, the panel failed to clearly see what the district court was actually suggesting and in so doing adopted a position that is unworkable and unprecedented ("jurisdictional chaos").

As a result, *the decision in this case is the first case in the history of this type of litigation* to leave substantial non-Indian fee lands within original reservation boundaries *after an area had been restored to the public domain* —in other words, after the area had been the subject of this type of a disestablishment surplus land statute.

If the panel had addressed, or at least noted, that portion of the *Hagen* opinion that set forth Inspector McLaughlin's "picturesque phrase" with special emphasis, it could not have recognized any such reservation boundary:

> Contemporary historical evidence supports our conclusion . . . . Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation. . . . " 'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*' " . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

Hagen, 510 U.S. at 416, 417 (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin,

U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903).

This Court in *Hagen* set forth this quote in the text of the *Hagen* Opinion in support of its "*conclusion*," including the *bracketed language* and the *added emphasis.* With "no outside boundary line to this reservation," all related precedent in this Court dictated that the diminished reservation "boundary" would coincide with the trust lands in the area, as the Ute Tribe and the United States recognized and told this Court at the time, as noted above. *Id.* Fee lands could not possibly still be within Indian country/reservation, as the panel has now erroneously concluded. *Ute Indian Tribe,* 114 F.3d at 1530-1531, App. 35a-36a.

Inspector McLaughlin's "picturesque phrase" ("pull up the nails . . . outside boundary") also establishes the proper historical perspective from which the new arguments of the Ute Tribe and United States should have been viewed. This Court's bracketed language and added emphasis underscore the significance of the point and undermine the novel proposition: namely, the historic boundaries of the Uintah Valley Reservation continue to exist, even after a restoration of the area to the public domain, in such a manner as to encompass these other fee lands (predominately owned by non-Indians) as well as the National Forest.

As a result, despite the clear language of *Hagen* evincing a termination of the historic reservation boundaries, the panel did not enter a judgment consistent with the decision in *Hagen.* Instead, the panel accepted the novel argument which *preserves* the historic boundaries of the Uintah Reservation in spite of *Hagen.* Again, this unique argument not only contradicts nearly a century of disestablishment/diminishment case law, as noted above, it also contradicts prior submissions by both the Ute Tribe and the United States *throughout* the *Ute Indian Tribe* and *Hagen* litigation.

The Ute Tribe and the United States led the panel to believe that the disestablishment of the original reservation boundaries had not been at issue throughout this litigation. As we established, however, prior submissions of both parties vitiate such a contention. Indeed, the language employed by both parties makes clear that they were well aware that the real issue never changed: Whether the original reservation boundaries were disestablished—*trust* lands versus original reservation boundaries.

Consistent with this position, Utah Attorney General Jan Graham referred to a Map exhibit coded to trust land and boundaries and explained to this Court in oral argument:

> MS. GRAHAM: [T]he undisputed reservation, which is 1.2 million acres. . . . [I]n the undisputed reservation, in the *trust* lands, on the tribal lands at Fort Duchesne. . . . [T]here is a reservation there, a big one, 1.2 million acres . . . . because of course the reservation, the *trust* lands that are there now are unchallenged by the State and, of course, always have been. . . .

Tr. of Oral Argument at 37, 38, 45, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added).

This was the "diminished" reservation referred to by *Hagen*.

On the other hand, the Ute Tribe and the United States have now parlayed casual references by this Court and the parties to a "diminished" reservation, intended only to summarily describe this *trust* land, into an argument that assumes continuing historic reservation "boundaries" that encompass all non-Indian fee lands, except those actually homesteaded. The attention of this Court is warranted here to address this important and far-reaching misreading of *Hagen*.

The public domain restoration language of the Act which opened the reservation for settlement was directed to "all unallotted lands." As such, it was not intended to simply remove only those lands from reservation status.

Instead, this restoration extinguished the historic reservation boundaries.

Nor is there any question that the misreading of *Hagen* has other far-reaching consequences. It has already been pointed out that the United States has introduced a version of this argument in the Eighth Circuit in the case of *Yankton Sioux Tribe v. Southern Missouri Waste Mgmt.*, 99 F.3d 1439 (8th Cir. 1996), *cert. granted sub nom. South Dakota v. Yankton Sioux Tribe*, 65 U.S.L.W. 3814 (U.S. June 10, 1997) (No. 96-1581). *See* discussion *supra* at 2. The Counties here have also filed an *Amici Curiae* brief in that case that recounts, in some detail, the legal arguments that demonstrate the extent to which *Hagen* has been seriously misconstrued. Br. of Duchesne County, Utah and Uintah County, Utah, *Amici Curiae*, in Supp. of Pet'r., State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) (August 7, 1997).[7]

Beyond that, it should also be noted that because the United States has not restricted the scope of the post-*Hagen* arguments to "public domain" restoration statutes (Yankton is a "cession" statute), the areas affected by all previous statutes could arguably be the source of even more litigation of this type. For example, the status of former allotments or other fee lands in the areas at issue in *Rosebud*, in *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975) *cert. denied* 430 U.S. 982 (1977), in *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (*per curiam*) *cert. denied*, 449 U.S. 905 (1980), or in any other similar

[7] In the brief on the merits to this Court in the *South Dakota* case, the United States never acknowledged support of the post-*Hagen* argument in the Tenth Circuit, or the fact that the United States had also submitted it in the Eighth Circuit in that case. No mention was made of any of this. Amazingly, however, in this same brief, the United States belittles the *Yankton* documentation for lack of specific references to disestablishment like the *Hagen* "no outside boundary" quotation—the very *Hagen* reference belittled by the United States and ignored by the court of appeals in the Tenth Circuit.

areas, deemed resolved for decades, could again be at issue. Nothing in *Hagen* can fairly be said to support this radical position.

D. This Court's Opinion in *Hagen* Does Not Support the Post-*Hagen* Argument.

This Court began its analysis in *Hagen* with a general observation:

> Our cases considering *operative* language of restoration have uniformly equated it with a congressional purpose to *terminate* reservation status.

Hagen, 510 U.S. at 413 (second emphasis added).

And the Court further stated:

> Likewise, in *DeCoteau* we emphasized the distinction between reservation and public domain lands: "That the lands ceded in the other agreements were returned to the public domain, *stripped of reservation status*, can hardly be questioned. . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'" 420 U.S., at 446 (emphasis added).

Id. at 413 (emphasis added).

The Court later set forth the following quotation in the text of the *Hagen* Opinion in support of its conclusion, including the bracketing and special emphasis:

> Contemporary historical evidence supports our conclusion. . . . Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation. . . . " 'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*' " . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

Id. at 416-417 (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18, to May 23, 1903).

In spite of these references to disestablishment precedent and to "terminate reservation status" " 'stripped of reservation status' " and " 'no outside boundary line to this reservation,' " the Ute Tribe and the United States now maintain that the result in *Hagen* does not support diminishment/disestablishment in any recognized sense. This argument seriously misconstrues *Hagen*.

At bottom, the sole basis of support for this argument is a narrow focus on two sentences in the *Hagen* Opinion, taken out of context, and viewed without any historical perspective whatsoever:

> In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished the reservation*.

Id. at 414 (emphasis added).

While the post-*Hagen* argument stresses the lack of reservation status "with respect to *those* lands," (rather than the lack of reservation status of the *area* affected) and "diminished the reservation" (as opposed to a *disestablished or terminated* the reservation description), it omits any reference to the "termination" description of *Ute Indian Tribe* in the very next sentence in *Hagen*. This sentence in the *Hagen* Opinion *undermines* both points and with them, the entire foundation for the novel post-*Hagen* argument.

In context, *Hagen* states:

> In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect

> to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not *terminate a reservation*, *Ute Indian Tribe*, 773 F.2d, at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, *cert. denied*, 498 U.S. 1012 (1990).

Hagen, 510 U.S. at 414 (emphasis added).

First, the Court prefaces the entire paragraph by expressly referencing "our precedent." *Id.* Second, in context, the complete paragraph makes clear that the Court was not fashioning or allowing any result that would accommodate such a novel argument even if it had been advanced and, of course, it was not. This *Hagen* "terminate a reservation" description of the overall issue in *Ute Indian Tribe*, squarely refutes any argument to the contrary. *See also DeCoteau*, 420 U.S. 425 ("terminated"). Lastly, this is the only permissible construction in light of the specific trust land versus historic boundary submissions detailed by all parties and *amici* throughout the *Ute Indian Tribe* and *Hagen* litigation.

E. Specific *Hagen* Submissions Clarify the Trust/Fee Jurisdictional Distinction and Undermine the Post-*Hagen* Argument.[8]

(i) Descriptions Employed by the Ute Tribe and the United States in *Hagen*.

Immediately after *Perank/Hagen* was decided by the Utah Supreme Court, the Ute Tribe and the United States

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[8] The Counties have limited the discussion here to post-Utah Supreme Court submissions to avoid repetition. Prior to that time and throughout the entire *Ute Indian Tribe* litigation, the Ute Tribe and the United States (and everyone else) repeatedly told all the courts, including this Court, the same thing—the issue was whether the reservation was "disestablished" except for the "trust" lands.

repeatedly told the United States District Court of Utah exactly what was at issue: the disestablishment of the original reservation boundaries, leaving only "trust" land as Indian country. Those express "disestablished" and "trust land" representations were submitted in conjunction with the motions for injunctive relief. It is true that after *Hagen* was decided in this Court, they changed their argument, but what they said before *Hagen* is telling. On July 31, 1992, the Ute Tribe submitted:

> The State Supreme Court's decision, . . . holds that the Uintah Valley Reservation was *disestablished*, except for those lands which are held in *trust* by the United States for the benefit of the Tribe. . . . The State court's judgment reduces, by almost *three* million acres, the criminal jurisdictional boundaries of the United States and Tribe. . . . The State law would subject tribal members who commit offenses off *trust* land to state criminal prosecution.

Mem. in Supp. of Renewed Mot. for Injunctive Relief at 8, 9, 10, *Ute Indian Tribe v. Utah* (D. Utah July 31, 1992) (No. C-75-408-J) (footnote omitted) (emphasis added).[9]

Two months later, in September, 1992:

> If permitted to be entered as a final judgment, *State v. Perank* would reduce the boundaries of the Uintah and Ouray Reservation, and, thus, the jurisdictional territory of the Tribe, under State law, to approximately *1.1 million acres of trust land*. . . . [T]he State Supreme Court ruled that the Reservation was *disestablished*, except for those lands held in *trust* for an individual Indian or the Tribe.

Tribe's Br. in Supp. of Permanent Inj. at 3, 8, *Ute Indian Tribe v. Utah* (D.Utah Sept. 24, 1992) (No. C-75-408-J) (footnote omitted) (emphasis added).

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[9] The Ute Tribe assumed the legal conclusion in *Perank/Hagen*, if affirmed, would also undermine the continuing existence of the original Uncompahgre Reservation. This point and the fact that the United States has now conceded that the Uncompahgre Reservation no longer exists, is discussed *supra*.

And then, in December, 1992, the Ute Tribe reiterated the same points in no uncertain terms:

> [T]he trial court had concluded that Clint Perank was an Indian and that Myton, Utah (*as well as all non-trust lands*) were *outside* the boundaries of the Reservation. . . .

Tribe's Reply Br. in Supp. of Permanent Inj. at 9, *Ute Indian Tribe* (No. C-75-408-J) (emphasis added).

The views of the United States were submitted to the district court at approximately the same time. In November, 1992, the United States unequivocally addressed this issue in similar terms:

> On July 17, 1992, the Supreme Court of Utah held in *State v. Perank*, 191 Utah Adv. Rep. 5 (1992), and two companion cases that the *exterior boundaries* of the Uintah and Ouray Indian Reservation (hereinafter "Reservation") have been *disestablished*. The state court ruling directly conflicts . . .

United States' Mem. as *Amicus Curiae* in Supp. of Ute Indian Tribe's Mot. for Injunctive Relief at 2, *Ute Indian Tribe v. Utah* (D.Utah Nov. 23, 1992) (No. C-75-408-J) (emphasis added) (footnote omitted).[10]

Nor did the Ute Tribe or the United States confine their views confirming the scope of the issue decided by the Utah Supreme Court to submissions in federal district court. The Ute Tribe told this Court the same thing for other reasons when opposing certiorari in *Hagen* in November, 1992:

> [T]he issue of whether Congress intended to *disestablish* the Uintah Valley Reservation, Utah.

Br. of *Amicus Curiae* Ute Indian Tribe in Opp'n to Granting the Writ of *Certiorari* at i, *Hagen*, 510 U.S. 399 (emphasis added).

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[10] It should be noted that this "disestablished" except for "trust land" analysis of the Ute Tribe and the United States was submitted to the same federal district court that subsequently, without mentioning the arguments, agreed with the Ute Tribe and the United States that "disestablished" except for "trust land" was not the issue presented or decided in *Hagen*.

It was in this light that this Court, fully informed, granted the petition for certiorari, notwithstanding the opposition of the Ute Tribe.

The United States, consistent with all previous submissions, also viewed the issue in the same light. However, the United States agreed that certiorari should be granted in *Hagen* because plenary review was appropriate. The review, according to the United States, would resolve the conflict between the views expressed by the Utah Supreme Court and the *Ute Indian Tribe* decision. The United States posed the question in the following manner:

> In *Perank*, the Utah Supreme Court concluded that the May 1902 Act and the March 1905 Act diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation.

Br. for the United States as Amicus Curiae, *at 5, Hagen*, 510 U.S. 399 (citing Respondent's Br. App. at 289-639, *State v. Perank*, 858 P.2d 927 (Utah 1992)).

On the merits, the Ute Tribe next filed a motion to intervene as a matter of right in this Court in May, 1993. Again, the Ute Tribe repeatedly recognized, emphasized, and stressed the scope of the issue presented:

> This case will determine for all time the exterior boundaries of the Uintah and Ouray Reservation (hereafter the "Reservation"), which is located in northeastern Utah. . . . [A]n issue that will finally determine the scope of its jurisdiction. . . . The ruling of the Tenth Circuit recognized that the Tribe's jurisdiction extends to some 4.4 million acres . . . the Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, *finding* that the Reservation consists only of those lands held in *trust* by the United States for the Tribe or individual Indians. The ruling of the Utah Supreme Court has the effect of reducing the size of the Reservation, and correspondingly the *area* over which the Tribe may exercise jurisdiction, by approximately *three* million acres. . . . Such a judg-

> ment would *reduce* the Reservation by almost *three million* acres and *deprive* the Tribe and the United States of all civil and criminal jurisdiction over the *non-trust lands* of the Uintah Valley portion of the Reservation. More importantly, because of the "checkerboard" nature of land ownership patterns, a judgment reducing the boundaries of the Reservation would result in a *tract-book* search to determine both civil and criminal jurisdiction. . . . [T]ribal members would, if the Reservation were to be adjudged diminished, be subjected to criminal prosecutions in state court for infractions occurring on *non-trust lands* of the Reservation. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975). Third, tribal members residing on *non-trust lands* of the Reservation would no longer be able to avail themselves of tribal court jurisdiction. . . . [T]ribal members not residing, working and locating their property on *trust* lands of the Reservation would be burdened. . . . As a practical matter, a diminishment of the Reservation would have the effect of creating two distinct classes of tribal members within the historic boundaries of the Reservation, those who live on *trust* lands and those who do not. Those members who reside on *trust* lands will continue to be subject to tribal and federal law, may make use of tribal courts and may participate in tribal government: However, those tribal members who now reside on *non-trust* lands of the Reservation . . . become persons subject to the jurisdiction of the State of Utah. . . . [T]he boundaries of the Reservation would no longer be at issue. . . .

Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 2, 4-5, 7-8, 8-9, 9 n.5, 10 n.7, *Hagen*, 510 U.S. 399 (footnote omitted) (emphasis added).

This Court denied the Motion to Intervene.

In June, 1993, the Ute Tribe then submitted its brief *amicus curiae* in this Court. For the third time, the Ute Tribe described to this Court the issues in the same manner.

> While a decision that the Reservation has been *disestablished* would subject *Indians* to the full panoply

> of *state* law for conduct on *non-trust lands*. . . . Therefore, any discussions between McLaughlin and the Utes were *irrelevant* except to the extent, if any, that they influenced Congress to abandon any intent it may have had to *disestablish* the Reservation.

Br. of *Amicus Curiae* Ute Indian Tribe at 10 n.11, 25 n.25, *Hagen*, 510 U.S. 399 (emphasis added).

The United States, as *amicus curiae*, also repeated the same arguments. At this point, the issue was still described in the same terms:

> QUESTION PRESENTED: Whether the provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, that relate to settlement of non-Indians on the Uintah Indian Reservation *altered the boundaries* of the Reservation. . . . This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. . . . [T]he Utah Supreme Court *erred* in relying (Resp. App. 37a) on Inspector McLaughlin's advice to the Indians that "there will be *no outside boundary line* to this reservation."

Br. for the United States as *Amicus Curiae* Supp'g Pet'r at i, 1, 23 n.31, *Hagen*, 510 U.S. 399 (No. 92-6281) (emphasis added).

Although the Ute Tribe did not participate in Oral Argument before this Court, the United States did. Nothing in the Transcript of Oral Argument supports the post-*Hagen* position of the United States:

> QUESTION: . . . speaking of restoration to the public domain, if land had been restored, would the *reservation boundary be excluded*. . . . MR. MANN: . . . the language would not have been sufficient to *alter the boundaries* of the reservation.

Tr. of Oral Argument at 18, *Hagen*, 510 U.S. 399 (emphasis added).

(ii) Language employed by the Petitioner in *Hagen*.

The preceding discussion of the views of the Ute Tribe and the United States fairly reflects the issue as submitted and decided in the Utah Supreme Court and in this Court. In all respects, the views of the parties and other *amici* also mirror this understanding. There is no need in this petition to further document that position, however, with one exception. That exception involves the arguments of Petitioner in *Hagen*. Petitioner's views are noteworthy in this regard because they were submitted by former attorneys of record for the Ute Tribe involved in the federal district court, the court of appeals, and this Court in opposing certiorari in the original *Ute Indian Tribe* litigation. *Ute Indian Tribe*, 773 F.2d 1087 (10th Cir. 1985) *cert. denied*, 479 U.S. 994 (1986). As such, these arguments reflect a familiarity with all aspects of the disestablishment issue in *Ute Indian Tribe* and *Hagen*. This is the perspective from which Petitioners' submissions on the merits in *Hagen* should be viewed:

> [*Hagen*] had lived for five to six years on the Ute Reservation on *nontrust land* in the vicinity of Myton, Utah.
>
> [T]he issue of Uintah Valley Reservation *disestablishment*. . . . The *status* of the Uintah Valley Reservation was the focus of attention, not the periphery of concern in the federal court litigation. . . . If the Court upholds the State of Utah Supreme Court decision of July 17, 1992, then the State of Utah and its subdivisions will exercise general civil and criminal jurisdiction over Indians whenever they are located off *trust* lands. . . . The plan selected by Congress to ultimately open the Uintah Valley Reservation lacked the two critical *characteristics* found by the Court to have accomplished a reservation *extinguishment*. . . . The Utah Supreme Court improperly analyzes a portion of the 1903 *McLaughlin* report as evidence of an intent to surrender the Reservation boundary. . . . [I]t is entirely unfair (and inaccurate after *Solem*) for Utah to contend that restoring Indian

> lands to the public domain in and of itself *extinguishes a reservation boundary*. . . .

Br. of Pet'r. at 4, 5, 16-17, 29, 37, 43 n.24, 48, *Hagen*, 510 U.S. 399 (emphasis added).

In the Reply Brief, the views of Petitioner reflect the same position:

> Before the Court today, Utah seeks a ruling that, in fact, the *boundaries* of the Uintah Valley Reservation were *disestablished*. . . . federal courts preserving the boundary of the Uintah Valley Reservation. . . . This appeal will determine whether the State of Utah criminal justice system (as opposed to federal and tribal courts) will prosecute Indians committing crimes on . . . presently owned in *fee* by non-Indians. Regardless of the outcome of this case, federal and Tribal courts will continue to prosecute Indians on . . . lands retained by the Ute Indian Tribe for its members.

Reply Br. of Pet'r. at 2, 16-17, *Hagen*, 510 U.S. 399 (emphasis added).

At oral argument, the same counsel for Petitioner on the merits briefs *supra* (that represented the Ute Tribe in the district court, the court of appeals, and before this Court in opposing certiorari in the *Ute Indian Tribe* litigation), presented the issue in even more succinct terms:

> MR. SENECA: [T]he question presented is whether or not the *boundary* of the Uintah Reservation was *disestablished*. . . . MR. SENECA: . . . Now, it's couched in terms of whether or not the reservation was *disestablished*, and the reason it's couched in those terms is that if the reservation *boundary* had been *disestablished*, then Myton, Utah, is not in Indian country. . . . MR. SENECA: [T]his Court is going to have to decide whether or not that reservation *boundary* has been *disestablished* or not.

Tr. of Oral Argument at 3, 5, 9, *Hagen*, 510 U.S. 399 (emphasis added).

CONCLUSION

Petitioners are not unmindful of the considerations governing review on certiorari. Nor are we unmindful of the work that went into the decisions of this Court in such cases as *DeCoteau, Rosebud* and *Hagen*. In this case, we respectfully submit that there is truly a direct conflict between the decision of the court of appeals and the decision of this Court in *Hagen*, which is apparent from the rationale of the court of appeals. If that conflict is not resolved in some fashion by some type of appropriate relief in this Court, much of the effort in *Hagen* and the other cases will have been expended for nothing. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Alternatively, consideration of this petition should be deferred until after this Court has had an opportunity to view the issue in light of the briefing and oral argument in *South Dakota v. Yankton Sioux Tribe* (No. 96-1581).

Respectfully submitted,

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